IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL APPEAL No. 2456 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

IBRAHIM @ IBHALO KASAM - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR RAJESH M AGRAWAL for Appellant(s) : 1,
MR LR PUJARI Ld. APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 20/07/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. The present appeal is preferred under section 374 of CrPC against the judgment and order passed by

the Presiding Officer, 13th Fast Track Court, Gondal in Sessions Case No. 27/2005 by which the learned Judge has imposed the sentence of 10 years R/I and fine of Rs. 1,00,000/-, in default, further S/I for one year under section 8(c), 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short N.D.P.S. Act),

2. The short facts giving rise to the present appeal are as under:

3. As per the prosecution case, the PSI of Upleta Police Station Mr NJ Chudasama received information about absconding accused while on petrolling in connection with CR No. 9/2005 along with ASI Bharatsing Juvansing Zala, Police Constable Kuldipsinh Rana, Dipendrasinh, Dineshbhai Natwarlal and Police Inspector Shri KD Parmar. He, thereafter made necessary entry in the station diary. During the petrolling at about 1.00 O'clock in the night, he caught hold off one person found near the bus stand, at Upleta. On the search being carried out of the bag he was found in possession of Ganja. Two panch witnesses were immediately summoned by Police Constable Dipendrasinh and Dineshbhai. Thereafter, the search of the person of the accused was carried

out but nothing was found from the clothes put on by him. However, when the search of the bag which was carried out by Shri Chudasama along with other police officers, ganja was found from the bag. The contraband article was thereafter weighed in the presence of panch witnesses. Shri Chudasama before carrying out the search of the person of the accused and his bag (thela), gave his identification and identification of other persons who accompanied him. The accused was also given an opportunity to have the search of the police officers who were present at the time of the raid. He was also given an option to have the search of his person in the presence of either Gazetted Officer or the Magistrate. The contraband article (ganja) when weighed in the presence of the panch witnesses it was found to be 3 kg and 600 grams worth Rs. 10,800/-. As the accused has committed the offence punishable under section 8(c), 20 and 29 of the NDPS Act he was immediately detained. The complaint in that regard was filed by Shri Chudasama and the offence was registered against the accused. Subsequently, the investigation was handed over to the PSI Shri Kishorsinh Ghanshyamsinh Zala. After completion of the investigation the charge-sheet was filed under the provisions of sec.

8(c), 20(b) and 29 of NDPS Act, 1985. The charge against the appellant has been framed vide ex. 5 on 7.6.2005 for the offence punishable under sec. 8(c), 20(b) and 29 of the NDPS Act, 1985 and the appellant pleaded not guilty to the charge levelled against him. In view of the aforesaid facts and circumstances of the case, the matter was set down for full-fledge trial before the sessions court.

4. The prosecution has examined the following witnesses in order to prove the guilt of the accused. They are as under:

1. Jayesh Rasikbhai Dakshini Ex. 8
2. Maheshbhai Sidabhai Bhimbha Ex. 12
3. Natvarsinh Jilubha Chudasama Ex. 13
4. Dineshkumar Natvarlal Gohel Ex. 16
5. Vikramsinh Bachubha Zala Ex. 17
6. Vanitaben Ramjibhai Parmar Ex. 22
7. Govindbhai Rajabhai Vaghmasi Ex. 25
8. Chandubhai Dalichandrabhai Ex. 27
9. Khumansinh Devubha Parmar Ex. 29
10. Kishorsinh Ghanshyamsinh Zala Ex. 35

5. The prosecution has also produced documentary evidence in support of the oral deposition adduced by it. They are as under:

1. Panchnama Ex. 9
2. Seizure Memo Ex. 10
3. Letter informing about the arrest of accused Ex. 11
4. Complaint Ex. 14
5. Yadi for registration of offence Ex. 15

6. Letter Ex. 18
7. Abstract of station diary Entry No. 3/05 Ex. 19
8. FIR Ex. 20
9. Abstract of Mudammal register Nondh No. 9 Ex. 23
10. Abstract of Sr No. 5 of Upleta Police Station Diary No. 17/05
11. Receipt of FSL Ex. 26
12. Certificate issued for weight of ganja Ex.28
13. Judgment as per Sec. 42 of NDPS Ex. 30
14. No Objection letter given by accused for search Ex.31
15. Letter written to Superintendent of Police, Rajkot about the raid carried out under NDPS Act. Ex. 32
16. Abstract of Log-book Ex. 33
17. Yadi for breaking of seal of muddamal Ex. 34
18. Copy of Radio message for handing over investigation Ex. 36
19. Forwarding letter about muddamal Ex. 37
20. Certificate of muddamal Ex. 38
21. FSL Report and letter Ex. 39 to 41

6. On the conclusion of the trial, the statement of the accused was recorded under sec. 313 of CrPC and the accused submitted before the court that he was falsely implicated in the case.

7. The ld. Judge after going through the entire gamut of oral deposition and documentary evidence held that the appellant was found in possession of ganja worth 3kg and 600 grams. When the raid was carried out on 17.2.2005 at about 1.00 O'clock in the night near the Bus stand of Upleta, the appellant was found in possession of ganja without any pass or permit and thereby the prosecution has established that accused has committed the offence punishable

under sec. 8(c), 20(b) and 29 of NDPS Act. The ld. Judge further held that all the mandatory provisions of NDPS Act were complied with by the prosecution and no lecuna or inconsistency was found in the deposition adduced by the prosecution. Thus, the ld. Judge held that as the prosecution has proved the case against the appellant by adducing cogent and convincing evidence, the appellant accused was imposed sentence of 10 years r/I and fine of Rs. 1,00,000/-, in default, S/I for one year under sec. 8(c), 20 and 29 of NDPS Act.

8. Learned advocate Mr. Agrawal appearing on behalf of appellant submitted that the deposition adduced by the prosecution do not inspire the necessary confidence to convict the appellant with the commission of the offence with which he has been charged. Ld. Advocate submitted that even on perusal of sec. 20 of NDPS Act, it becomes absolutely clear that the quantity which was recovered from the appellant was more than small quantity and lesser than the commercial quantity. The sentence provided under sec. 20(b)(ii)(B)of NDPS Act is for a maximum period of 10 years and since the discretion is given to the Court, there was enough scope for the learned

Judge to consider lesser punishment then the imposition of R/I for 10 years. Even the discretion is given to the learned Judge with regard to the imposition of fine under the said sub-section and maximum fine which can be imposed on the accused is up to Rs. 1 lac. Learned advocate submitted that in view of the notification specifying small quantity and commercial quantity given under the Act and on perusal of item no. 55, it becomes clear that minimum quantity prescribed for ganja under col. 5 is 1 kg and the commercial quantity prescribed under col. 6 is 20 kg. Thus, considering the aforesaid aspect, the learned Judge ought to have awarded less punishment rather than awarding R/I of 10 years and fine of Rs. 1 lac. Ld. Advocate submitted that even the sealing procedure which was carried out by the Investigating Agency was of a doubtful nature as the minimum requirement or the care which was required to be taken for the purpose of sealing of mudammal article was not taken by the Investigating Agency. Thus, the learned advocate submitted that in view of the evidence adduced by the prosecution and the reasoning assigned by the ld. Judge, the appellant was found in possession of ganja weighing 3kg and 600 grams which is admittedly higher than the lesser

quantity prescribed under the Notification as 1 kg and less than commercial quantity i.e. 20 kg. Thus, the sentence imposed on the appellant is very harsh and therefore, he be imposed sentence which is less harsh in the facts and circumstances of the case. Ld. Advocate even pleaded that the sentence which is already undergone by the appellant would serve the purpose and he be imposed the sentence which he has already undergone.

9. As against the aforesaid submissions, learned APP Mr. LR Pujari appearing for the respondent-State vehemently submitted that the order passed by the ld. Judge is just and proper and it does not call for any interference. Ld. APP submitted that all the mandatory provisions of the NDPS Act were complied with by the Investigating Agency and as there was no violation or breach of the provisions of the NDPS Act, the order of sentence and the fine imposed by the ld. Judge requires to be upheld. Ld. APP also submitted that necessary procedure for the sealing of the mudammal article was followed in a scrupulous manner and, there was no tampering of the mudammal article and therefore even on that count the argument canvassed by the learned advocate requires to be

rejected. Thus, ld. APP submitted that taking into account overwhelming evidence adduced by the prosecution and the involvement of the appellant in the commission of the offence, the sentence as imposed by the ld. Judge requires to be upheld and the appeal deserves to be dismissed.

10. We have heard the ld. Advocate Mr Agrawal for the appellant and Ms. LR Pujari ld. APP appearing for the respondent -State and perused the evidence produced on the record of the case.

11. We have carefully perused the oral deposition adduced by the prosecution and the documentary evidence on which heavy reliance is placed by the prosecution with a view to prove the guilt against the appellant. The appellant was found in possession of ganja of 3kg & 600 grams. First PSI, Upleta Shri Natwarsinh Jilubha Chudasama on receipt of the information about the absconding accused of CR No. 9/2005 was on petrolling near the Bus stand at Upleta along with other members of the police party. During the petrolling he accosted one person and on inquiry being made by him, he was found in possession of contraband article (ganja). When the same was

weighed in the presence of panch witnesses it was found to be 3kg and 600 gram. Thereafter, other formalities were completed in the presence of panch witnesses and the panchnama in that regard was prepared. However, as there is no dispute about the seizure of contraband substance ganja, we do not discuss the entire evidence threadbare.

12. On perusal of overall deposition adduced by the prosecution and the documentary evidence produced in the present case, we are of the considered view that the quantity which was seized from the appellant i.e. Ganja was to the tune of 3kg and 600grams. Section -20 of the NDPS Act provides that when the quantity which is involved is small than the R/I for a term which may extend to six months or with fine which may extend to Rs. 10,000/- or with both, can be imposed. When the quantity which is involved is lesser than the commercial quantity but more than the small quantity, then the punishment which can be imposed is R/I for a term which may extend to 10 years and with fine which may extend to one lakh rupees. Thirdly, when the quantity involve is of a commercial quantity then a sentence of R/I for a term which shall not be less than 10 years but which may extend to even 20

years and the fine shall also be not less than Rs. One lakh but it can extend to Rs. Two lakhs can also be imposed. In view of the clear provision with regard to small quantity, the quantity which is lesser than the commercial quantity but more than small quantity and the quantity which is commercial quantity, the sentence which can be imposed under sec. 20(b)(ii)(B) by the court may extend upto 10 years and with fine which may even extend to Rs. One Lakh. Thus, a discretion is given to the Court. On perusal of the Notification specifying small quantity and commercial quantity issued by the Central Government in supersession of the Notification bearing No. S.O.527(E) dated 16.7.1996 the small quantity and commercial quantity has been mentioned in Col. 5 & 6. On further perusal of Item No. 55 which is in respect of Ganja and more particularly Col. No. 5 the smaller quantity mentioned therein is 1Kg, while in Col. No. 6, commercial quantity is mentioned as 20kg.

13. The Ld. Judge has imposed the sentence under sec. 8(c), 20 and 29 of NDPS Act. On perusal of the said sections, more particularly sec. 29 of the NDPS Act, which is with regard to the punishment for

abatement and criminal conspiracy. Section – 29 reads as under:

> 29. Punishment for abetment and criminal conspiracy.-(1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code (45 of 1860), be punishable with the punishment provided for the offence.
>
> (2)A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which-
>
> > (a) would constitute an offence if committed within India; or
> > (b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India.

14. Thus, on bare perusal of the said section, it is clear that when accused commits abetment in selling, purchasing etc. of the illicit drug and indulges in a criminal conspiracy, then section-29 of the NDPS Act can be attracted. Section-8 provides for prohibition of certain operations. While Section-8(c) prohibits production, manufacture, possession, transportation,

consumption, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder.

15. In view of the aforesaid facts and circumstances and taking into account the quantity which was recovered from the appellant which is admittedly 3kg & 600 grams and on perusal of sec. 20(b)(ii)(B) of the NDPS Act the sentence imposed by the learned Judge on the appellant, in our considered view, is on a higher side. The sentence taking into account the evidence on record of the case is required to be modified to the extent of 3 years R/I and a fine of Rs. 20,000/-, in default, further S/I for one month instead of 10 years R/I and a fine of Rs. One lakh, as imposed by the learned Judge. In view of the foregoing discussion, we pass the following order:

16. In the result, this appeal is partly allowed. The judgment and order passed by the learned Presiding Officer, 13th Fast Track Court, Gondal in Sessions Case No. 27/2005 imposing sentence of 10 years R/I and fine of Rs. 1 lac, in default, further

S/I for one year under section 20, 8(c) and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, is hereby modified to the extent of 3 years R/I and a fine of Rs. 20,000/-, in default, S/I for one month under sec. 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

Mudammal article to be destroyed after the appeal period is over.

(A.R. DAVE, J.)

(H.B. ANTANI, J.)

mandora/